

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1372

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1372

ANDRE GONZALEZ,

Appellant,

—against—

UNITED STATES OF AMERICA,

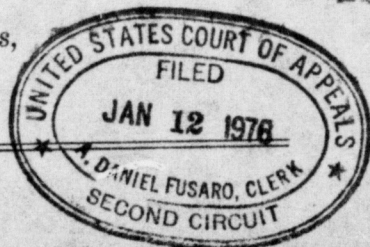
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
DOUGLAS J. KRAMER,
*Assistant United States Attorneys,
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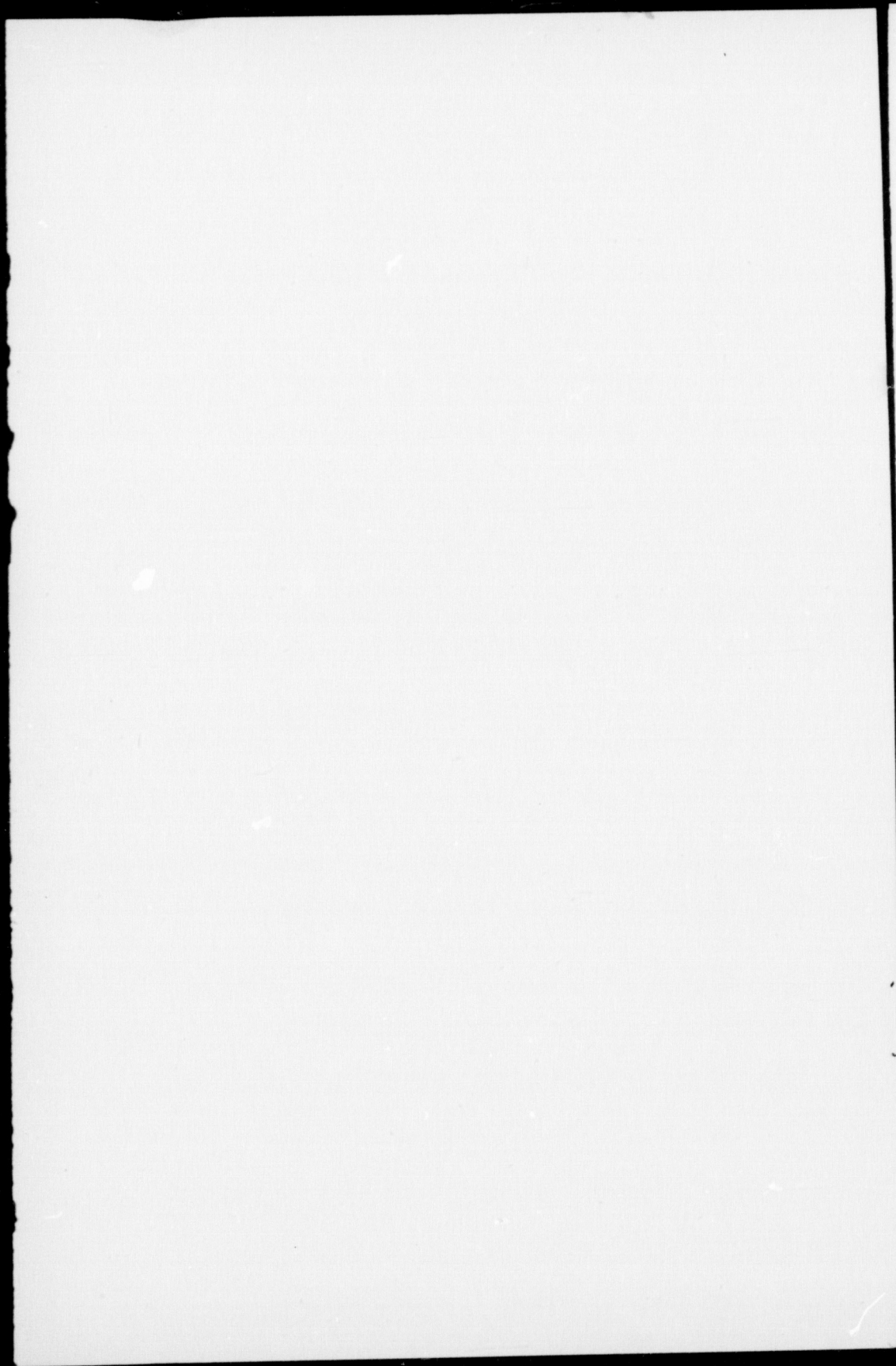


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1372

ANDRE GONZALEZ,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

Andre Gonzalez appeals from the judgment of the United States District Court for the Eastern District of New York (Bartels, J.) entered on September 26, 1975, convicting him, following a jury trial, of violating Title 21, United States Code, Section 841(a)(1), as charged in a four count indictment, in that, on January 16th and March 8, 1975 he did knowingly and intentionally possess with intent to distribute approximately 26.45 and 52.43 grams of heroin (Counts I and III, respectively) and, on those two days, he knowingly and intentionally distributed the same (Counts II and III, respectively). The appellant was sentenced to concurrent terms of five years in prison on each count, with a four year term of special parole to follow completion of the prison sentence. Gonzalez is presently serving his sentence.

Appellant has raised two issues on appeal. He contends that it was reversible error for the trial judge to

refuse to order the disclosure of the identity of the Government's informant and he contends that the trial judge unduly interfered with the conduct of the trial.

Statement of the Case

Horace D. Balmer, a detective for the New York City Police Department, was the chief government witness (56).¹ After making an in-court identification of the appellant, Detective Balmer testified that he had first met Andre Gonzalez on January 8, 1975 at 725 4th Avenue in Brooklyn, New York (56, 57). Gonzalez was alone at that meeting with Detective Balmer and an informant, who introduced the two men (57, 147-148). Detective Balmer testified that he had a conversation with Gonzalez in English, during which Gonzalez and Balmer each understood the other concerning the purchase of narcotics, as a result of which Gonzalez gave Balmer a sample of brown rock heroin, Government Exhibit 4 (58, 59, 96).² Balmer and Gonzalez discussed the quality of the sample in English and Balmer indicated that he would make purchases depending on the quality of the sample (59-60, 64-65). Balmer again identified Gonzalez as the man with whom he had the foregoing conversation and transaction on January 8, 1975 (67).

¹ References are to the trial transcript.

² Robert Henderson, a forensic analyst employed by the United States Department of Justice, Drug Enforcement Administration, at its Northeast Regional Laboratory testified as to the analysis of three government exhibits (4, 5 and 6) that he had received on three dates (23). He testified that Exhibit 4, a sample he received on January 8, 1975, contained 61.9 percent heroin, that Exhibit 5, received on January 24, 1975 contained 47.6 percent heroin, and that Exhibit 6, received on April 15, 1975 contained 43.2 percent heroin (25, 27, 28, 29, 30). These exhibits were introduced in evidence; the sample was introduced over appellant's objection (88).

The next meeting between Detective Balmer and Andre Gonzalez occurred on January 16, 1975 at the same location as the previous meeting (68). Present at this meeting were Balmer, Gonzalez, a Hispanic male referred to by Gonzalez as "Angel," and an Hispanic female (69). Further conversation about heroin took place between Gonzalez and Balmer in English (70, 71). Following a telephone call Gonzalez informed Balmer that his connection was not home and he would have to wait for the heroin (71).

While they were waiting, Gonzalez asked Balmer how much money Balmer had with him and Balmer told him \$2200 (73). Gonzalez informed Balmer that the heroin would cost \$2300 an ounce, but said that he would accept a drivers license in lieu of the extra hundred dollars (73). Balmer said he would try to get the license and took information from Gonzalez for the license (73, 74). No heroin was purchased during this meeting and Balmer left around five o'clock (75, 76). Shortly thereafter Balmer telephoned Gonzalez, who told Balmer that everything was okay and that he should return (77). Balmer returned and purchased some heroin, Government's Exhibit 5 (78). The money for the heroin was given to Gonzalez with the other male, Angel, possibly present (78). Balmer, however, had no negotiations with Angel (78-79). Balmer again identified Gonzalez as the man to whom he gave the money on January 16, 1975 (79).

Balmer next testified about a meeting with Gonzalez on March 5, 1975, at which time Angel was also present (80). Balmer had a drivers license for Gonzalez and gave it to him (85). As before, after Balmer revealed that he had \$4500 with him, he was told he was \$100 short, but that a drivers license, this time for Angel, would suffice for the difference (85). Information about Angel was taken down for the license and then, at Gon-

zalez's direction, Angel went into another room and returned with two ounces of heroin. Balmer went to pay Angel, but Gonzalez took the money (87). Balmer identified Government's Exhibit 6 as the heroin purchased on March 6, 1975 and again identified Gonzalez as the man to whom he paid the money and from whom he received the heroin on March 6, 1975 (87, 89).

George Lemoine, who was an investigator and undercover agent for the Drug Enforcement Task Force during the relevant times testified as to the handling of the heroin after purchase (159, 160-163, 167, 174). He stated that on April 29, 1975 he arrested Gonzalez and seized from his possession the driver's license previously supplied by Balmer (172, 176, 177).

Andre Gonzalez did not testify and the defense rested after the Government's case.

ARGUMENT

POINT I

The Trial Judge's refusal to order disclosure of the identity of the Government informant was not error.

The undercover agent, Detective Balmer, was introduced to the appellant by an informant at the initial January 8th meeting (58, 147-148). Detective Balmer testified that he was present when he had his introductory conversation relative to the purchase of narcotics (148). Based on this testimony, appellant assigns as error the failure of the trial judge to order disclosure of the informant's identity.

Prior to trial, defense counsel, Martin Light, had been given the entire Gonzalez file (153). The file, containing the reports of Detective Balmer, clearly indicated that an informant, identified by a number, made the introduction (94-95). No motion was made for disclosure of the informant's identity prior to trial.

During cross-examination, Detective Balmer testified that he did not know the name of the informant (93). There is some indication in the record, though, that appellant knew the informant, as indeed it might be expected he would (93, 96). Following Detective Balmer's testimony, appellant's attorney requested disclosure of the informant's identity, stating as his basis that the informant was present at the introduction and partook in a conversation relative to the purchase of drugs (150).³

The court requested appellant's attorney to supply cases supporting the proposition that an informant present at an introduction must be disclosed, which cases were never supplied (151). Accordingly, the request was denied (152).

It is significant that appellant did not renew his request at any further point in the trial and did not even request an instruction from the trial judge concerning the failure to produce the informant. Cf. *United States v. Beckerman*, 516 F.2d 905, 909 n. 8 (2d Cir. 1975).

Despite the court's denial of appellant's request for disclosure of the identity of the informant, appellant had ample opportunity, which he used, to argue in summation that the government was holding back the informant,

³ The record does not indicate that the informant participated in the conversation, but that he only was present (148).

with all the adverse implications that might attach (198-199).

Appellant relies principally on *Roviaro v. United States*, 353 U.S. 53 (1957) to support his claim of error. Appellant apparently claims that it was the other hispanic male, "Angel", and not appellant, who was present at the introductory meeting and thus the informant could contradict Detective Balmer's initial identification of Gonzalez as the person with whom he spoke and from whom he received heroin on January 8, 1975. This, it is argued, would throw doubt on the rest of Balmer's testimony. *Roviaro* involved an informant who played a material part in bringing about the possession of drugs by the accused. In *Roviaro* the informant was not merely present at an introduction, but was present with the accused during the actual commission of the crime and played a direct role in the commission of the crime. Indeed, in *Roviaro* the informant was actually named in the indictment as "John Doe". *Id.* at 55.

In the case at bar, there is nothing in the record to indicate that the informant played any role beyond that of introducing Balmer to Gonzalez. The cases are clear that the mere introduction by an informant of an undercover agent to a narcotics dealer does not supply, by itself, grounds for disclosure. *United States v. D'Amato*, 493 F.2d 359, 366 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974), *United States v. Soles*, 482 F.2d 105, 109 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973). See also cases collected in *United States v. Bell*, 506 F.2d 207, 218 n. 75 (5th Cir. 1974). That a sample of heroin was passed at this introductory meeting does not make the informant's

role any more important.⁴ The purpose for which the appellant apparently claims he wished to use the informant, to impeach Balmer's identification of Gonzalez at the January 8th meeting, is in no way affected by the fact that heroin actually passed hands at that meeting. The informant's role was not greater because of the heroin.

As in the case of *United States v. D'Amato, supra*, the informant here was not intricately involved in the transactions for which the appellant was tried and convicted. *Id.* at 366. Similarly, as in *D'Amato*, the record in no way supports the argument that testimony of the informant might cast doubt on the testimony of the undercover agent. Detective Balmer positively identified Gonzalez as being the seller in each of the two sales charged in the indictment (79, 114). The informant was not present at either of these sales. There is nothing in the record that would cast doubt on these identifications. See *United States v. Soles, supra*.

Appellant also argues that Balmer might have been lying and that the informant could impeach his testi-

⁴ Appellant argues that since the sample piece of heroin (Exhibit 4), transferred at the introductory meeting, was introduced as evidence, the informant was an active participant (Appellant's Brief, p. 15 note). The heroin transferred at the January 8, 1975 meeting was not included in the indictment and testimony about the introductory meeting, including the transfer of heroin, was offered solely as evidence of a similar act which is admissible "when it is substantially relevant for a purpose other than merely to show defendant's criminal character or discipline." *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967), *United States v. Miranda*, Docket No. 74-2651 (2d Cir., December 3, 1975) at p. 6568 and cases cited therein. Here testimony about the January 8, 1975 meeting and the sample heroin were offered to establish the foundation for the subsequent meetings and sales and to establish Gonzalez's intentions.

mony. But the informant was not present at either of the charged sales and thus could offer no testimony to rebut the positive identifications. Cf. *United States v. Bell, supra*, 506 F.2d at 218. Not only was the informant not present, but it appears that there was a possible witness, the Hispanic female present at the January 16, 1975 sale (69). There is no indication in the record that she was unavailable to the defense. *United States v. Jackson*, 384 F.2d 825, 827-28 (3rd Cir.), cert. denied, 392 U.S. 932 (1968). Furthermore, the fact that the driver's license supplied by Balmer to Gonzalez was in the possession of Gonzalez at the time of his arrest corroborates Balmer's testimony (172, 177). *United States v. Sch... supra*.

Thus the failure of the court to order the disclosure of the identity of the informant was not error.⁵

POINT II

Judge Bartels' conduct during the trial in no way deprived appellant of a fair trial.

Appellant contends that Judge Bartels unduly interfered with his trial, depriving him of a fair trial. He contends that the judge's comments directed at his counsel, Martin Light, and the judge's participation in the questioning of the government's witnesses reflected an improper attitude of partisanship.

While a trial judge must avoid at all times even the appearance of partiality, *United States v. Glaziou*, 402

⁵ One obvious reason for not disclosing the identity of the informant was the fact that "Angel", the comrade of Gonzalez, was a fugitive at that time (132) and thus the informant might be in danger.

F.2d 8 (2d Cir.), *cert. denied*, 393 U.S. 1121 (1969), he is entitled to interrupt the examination of witnesses and to ask questions himself in order to clarify the issues at trial. *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960), *United States v. Pellegrino*, 470 F.2d 1205, 1206-1208 (2d Cir.), *cert. denied*, 411 U.S. 918 (1973), *United States v. Miley*, 513 F.2d 1191, 1205 (2d Cir. 1975).

Indeed, the trial judge cannot discharge his responsibility to see that the law is properly administered "by remaining inert" *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945). It is the duty of the judge to take an active part in the examination of witnesses when necessary to clarify testimony and assist the jury in understanding the evidence. *United States v. Tyminski*, 418 F.2d 1060, 1062 (2d Cir.), *cert. denied*, 397 U.S. 1075 (1970), *United States v. Brandt*, 196 F.2d 653, 655 (2d Cir. 1952), *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961).

Appellant assigns as error the several occasions when Judge Bartels participated in the direct examination of the undercover agent, Detective Balmer. (58-60, 65-67, 82-83, 83-85). A review of these instances reveals that Judge Bartels' purpose was to clarify and that, in no case, did they serve to rehabilitate Detective Balmer's previous testimony. Thus, in the first instance set forth at length by the appellant (Appellant's Brief pp. 35-36) the judge is clarifying testimony concerning the sample of heroin given at the introductory meeting and not giving the witness an opportunity to correct himself. Similarly in the instance set forth at length in Appellant's Brief at p. 36-37 Judge Bartels was attempting to clarify foundation testimony for the offer of the drivers license obtained by Detective Balmer for Gonzalez and subsequently found in Gonzalez's possession at the time of his

arrest. Here, as in every other instance of questioning from the bench cited by the appellant, no rehabilitation was effected.

Appellant also cites Judge Bartels interjection into the cross-examination of the government's witnesses. (41-42, 43, 48, 51, 92, 111, 120-121, 132-137, 141, 189, 192). In a number of these cited instances there is no real interference at all (92 [side bar], 141, 192). Other instances involve control by the court of counsels irrelevant questions (120-121, 34-36), counsel's misuse of cross-examination (51), and the counsel's argumentative questioning. (43, 111, 132-133). Moreover, in no instance has appellant indicated what material information might have been elicited that was not.

An examination of the record reveals none of the abuses condemned in *United States v. Nazzaro*, 472 F.2d 302 (2d Cir. 1973). There was no rehabilitation of witnesses whose credibility had been undermined by the defense counsel, *Id.* at 307, and, since there were no defense witnesses, no interference with the defense. There were no statements indicating a belief in the truth of any of the testimony of the government's witnesses. *Id.* at 310. The judge's questioning was entirely proper and within the bounds permitted. *United States v. Miele*, 481 F.2d 960 (2d Cir. 1973), *United States v. Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975).

Appellant further assigns as error the several comments directed by Judge Bartels at defense counsel Martin Light in the presence of the jury. Of course, acrimony and hostility between judge and counsel, particularly before a jury, are to be condemned. *United States v. Boatner*, 478 F.2d 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973). Nevertheless, an examination of the instances cited by the appellant of judicial comment

directed at Mr. Light (40, 43-44, 48, 49-50, 97, 111-113, 120, 123-124, 141-142, 147, 153, 191) fails to disclose behavior which could have prejudiced the jury against the defendant. Thus, for the most part, the cited judicial comments were directed at improper or irrelevant questions posed by Mr. Light. (43-44 (argumentative), 123-124 (irrelevant), 120 (irrelevant), 47 (direct examination during cross), 48 (argumentative), 110-111 (argumentative), 40 (argumentative), 48 (argumentative)).

In sum, there was nothing in Judge Bartels' comments, all of which were directed at the conduct of counsel and not at the strength of the case, cf. *United States v. Boatner*, *supra* at 740, that could create an impression that the judge personally believed in the guilt of the defendant, *Boatner*, *id.*⁶ Similarly, there is no indication that Mr. Light was in anyway intimidated by the comments of Judge Bartels, *Boatner*. *Id.*

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: January 12, 1976

Respectfully submitted,

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Of Counsel.

⁶ In the charge, the court instructed the jury that it was not to draw any conclusion from the questions asked by the court or from the comments the court made to counsel (218-219). Cf. *United States v. D'Anna*, 450 F.2d 1201, 1206 (2d Cir. 1971).

AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK, ss:

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day of January, 1976-----, I deposited in Mail Chute Drop for mailing in the
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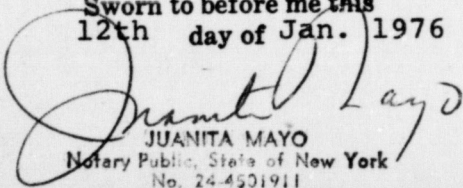
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Foley Square

New York, N.Y. 10007-----

Sworn to before me this
12th day of Jan. 1976


JUANITA MAYO
Notary Public, State of New York
No. 24-4501911

Qualified in Kings County
Commission Expires March 30, 1977

